

ESTTA Tracking number: **ESTTA651065**

Filing date: **01/20/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85318060
Applicant	Monster Cable Products, Inc.
Correspondence Address	DAVID M KELLY KELLY IP LLP 1330 CONNECTICUT AVE NW, SUITE 300 WASHINGTON, DC 20036 UNITED STATES linda.mcleod@kelly-ip.com, docketing@kelly-ip.com, david.kelly@kelly-ip.com, stephanie.bald@kelly-ip.com
Submission	Appeal Brief
Attachments	FINAL Appeal Brief 1 20 15 (386143xD1162) (386150xD1162).pdf(394612 bytes)
Filer's Name	Robert D. Litowitz
Filer's e-mail	docketing@kelly-ip.com, robert.litowitz@kelly-ip.com, linda.mcleod@kelly-ip.com, cheryl.suh@kelly-ip.com
Signature	/Robert D. Litowitz/
Date	01/20/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Monster, Inc.
Serial Number: 85318060
Filing Date: May 11, 2011
Mark:



Examining Atty: Kim Teresa Moninghoff, Esq.
Law Office: 113
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT'S APPEAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. FACTS	2
A. Monster and its Cable Design Trademark	2
B. Monster’s Utility Patent Does Not Claim Contoured Edges.....	5
III. DISCUSSION	8
A. Monster’s Mark Is Not Functional.....	8
1. Monster’s Utility Patent Does Not Provide Prima Facie Evidence of Functionality.....	8
a. Monster’s Patent Does Not Claim the Applied-For Mark	9
b. None of Monster’s Advertising Materials Tout the Design’s Utilitarian Advantages.....	11
2. There Are Dozens of Functionally Equivalent Designs On the Market..	11
B. Monster’s Mark Is Not Generic.....	14
IV. CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>In re Becton, Dickinson & Co.</i> , 102 USPQ2d 1372 (Fed. Cir. 2012).....	8, 10
<i>In re Caterpillar Inc.</i> , 43 USPQ2d 1335 (TTAB 1997)	8
<i>In re Dietrich</i> , 91 USPQ2d 1622 (TTAB 2009)	11
<i>In re Kun Yuan Lin</i> , 2012 WL 6654122 (TTAB 2012)	11
<i>In re Morton-Norwich Prods., Inc.</i> , 213 USPQ 9 (C.C.P.A. 1982).....	8, 11
<i>In re Udor U.S.A., Inc.</i> , 89 USPQ2d 1978 (TTAB 2009).....	8
<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844, 214 USPQ 1 (1982).....	8
<i>Philips v. AWH Corp.</i> , 75 USPQ2d 1321 (Fed. Cir. 2005).....	9
<i>Qualitex Co. v. Jacobson Prods. Co.</i> , 514 U.S. 159, 34 USPQ2d 1161 (1995).....	8
<i>Stuart Spector Designs Ltd. v. Fender Musical Instruments</i> , 94 USPQ2d 1549 (TTAB 2009)...	14
<i>TrafFix Devices, Inc. v. Mktg. Displays, Inc.</i> , 532 U.S. 23, 58 USPQ2d 1001 (2001)	8, 9
<i>Valu Eng’g, Inc. v. Rexnord Corp.</i> , 61 USPQ2d 1422 (Fed. Cir. 2002).....	8, 11

Other Authorities

TMEP § 1202.02(a)(iv).....	8
TMEP § 1202.02(a)(v)(A)	9
TMEP § 1202.02(a)(v)(B)	11

Treatises

2 McCarthy on Trademarks and Unfair Competition § 12:57 (4th ed.)	14
---	----

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Monster, Inc.
Serial Number: 85318060
Filing Date: May 11, 2011
Mark:



Examining Atty: Kim Teresa Moninghoff, Esq.
Law Office: 113
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT'S APPEAL BRIEF

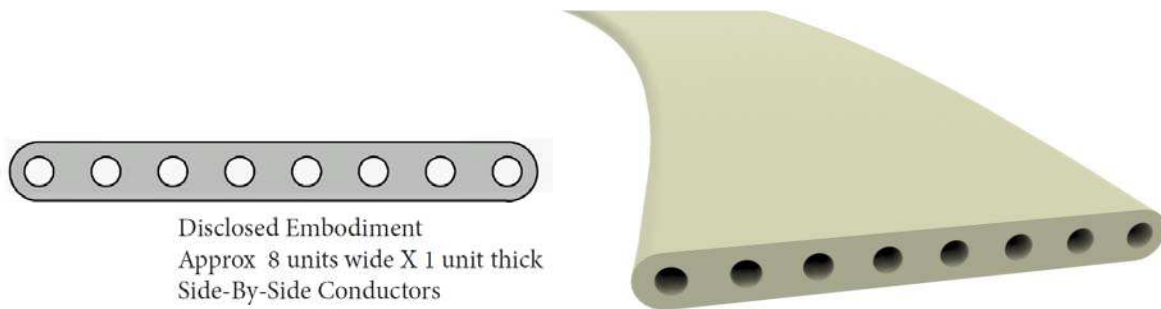
I. INTRODUCTION

The issue presented in this appeal is whether the Examining Attorney has properly maintained a refusal to register applicant's mark on grounds of functionality and genericness when that refusal is based primarily on applicant's utility patent that does not claim or describe the mark in question as being functional, where numerous design alternatives exist that can be made without increased cost or complexity, and where the applicant has refuted the Examiner's unsupported conclusions about that mark. As shown below, the Examining Attorney failed to present a *prima facie* case, and applicant's evidence shows that its mark is neither functional nor generic. Those refusals to register should be withdrawn.

II. FACTS

A. Monster and its Cable Design Trademark

Monster, Inc. is a leading manufacturer of high-performance consumer electronics accessories including consumer and professional cables, wireless devices, mobile accessories, power products, speakers, and, of particular relevance to this appeal, headphones. Monster has filed trademark application serial number 85318060 (the “Application”). As illustrated below, the mark consists of the “curved outside contours of a headphone cable that give way to sides of the cable jacket that are wider than they are thick.”¹ (Dkt. 15, Rake Decl., Ex. B.) Viewed as a cross section, cables featuring the mark will appear as “oblong in shape,” as shown below:



As explained in the attached declaration of Jacky Hsiung, an industrial designer at Monster who co-designed this cable and who thus participated in creating this mark, the curved outside contours are a design feature—not a utilitarian one. As further explained by Professor Lance Rake,² whose declaration was submitted in support of Monster’s application, edge treatments such as the contoured edges of Monster’s mark can be important design elements and can materially affect how consumers and users perceive a product. (*Id.* at ¶ 21.) Contoured edges are just one of numerous possible edge treatments, and here, Monster used contours for

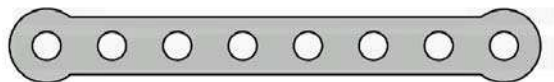
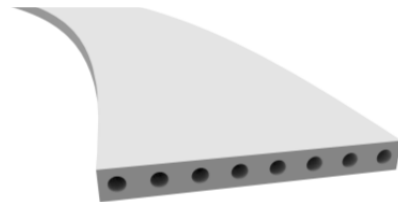
¹ Monster requested to amend the description of the mark on July 24, 2014 to: “The mark consists of a headphone cable having a cross-section in the form of an oblong, wherein the cable features contoured outer edges and is significantly wider than it is thick.” The Examining Attorney has proposed alternative language, which Monster accepts. Accordingly, the request to clarify the description of the mark is moot.

² Professor of Design at The University of Kansas, Lawrence Kansas. (Dkt. 15, Rake Decl., Ex. A.)

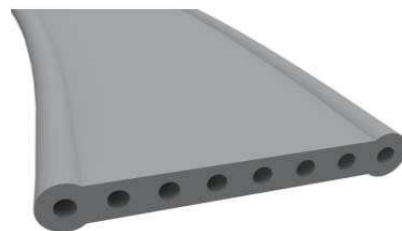
their aesthetic and ornamental appeal. (Dkt. 27, Hsiung Decl. ¶ 4.) Significantly, the contoured edges do not perform any function, and, in fact, are irrelevant to the functions carried out by the cable. Those functions, namely, reducing tangling and accommodating wires for sound transmission, can be accomplished by a variety of other cable designs. Professor Rake in fact presented ten alternative cable designs with alternative edge treatments, each of which is capable of performing these functions without adding to the cost or complexity of manufacture. (Dkt. 15, Rake Decl. ¶ 21, Ex. B.) Representative examples of these alternative designs are shown below:



Alternate Embodiment 1
Approx 8 units wide X 1 unit thick
Side-By-Side Conductors



Alternate Embodiment 3
Approx 8 units wide X 1 unit thick
Side-By-Side Conductors



Alternate Embodiment 5
Approx 8 units wide X 1 unit thick
Side-By-Side Conductors

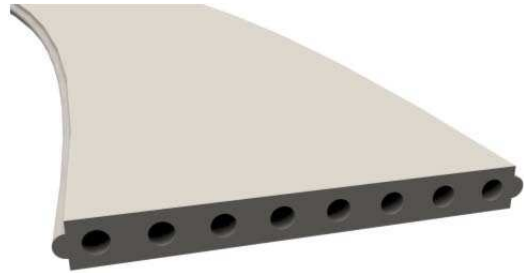


Alternate Embodiment 7
Approx 8 units wide X 1 unit thick
Side-By-Side Conductors





Alternate Embodiment 8
Approx 8 units wide X 1 unit thick
Side-By-Side Conductors



The availability of alternative designs is more than theoretical. The marketplace reveals many examples of tangle-free cables that do not feature Monster's mark. Representative examples of those alternative cable designs are shown below:



Dkt. 41, Coleman Decl. Ex. 1³



Dkt. 41, Coleman Decl. Ex. 3⁴



Dkt. 41, Coleman Decl. Ex. 24



Dkt. 41, Coleman Decl. Ex. 10



Dkt. 41, Coleman Decl. Ex. 19⁵

³ Contains a ridge in the center of the cable.

⁴ Contains fabric wrapped around the entire cable.

B. Monster's Utility Patent Does Not Claim Contoured Edges

Monster also owns U.S. Patent No. 8,068,633 B2 entitled "Headphone Cable Splitter" (the "Monster Patent" or "'633 patent") (Feb. 23, 2012 Response to Office Action). Mr. Hsiung is a co-inventor of the invention disclosed and claimed in the '633 patent. Monster's patent has two claims. Claim 1, the sole independent claim, and dependent claim 2 are directed to cables that have both "width" and "thickness," wherein the width is "substantially greater than" the thickness:

1. A headphone cable having the following sections: a unitary cable section having left and right audio channel conductors, said unitary cable section having a cross-sectional width and thickness, said width being substantially greater than said thickness; and left and right cable sections electrically coupled to said left and right audio channel conductors, respectively, of said unitary cable section, and for connecting to the left and right earpieces of a headphone, said left and right cable sections having cross-sectional widths and thicknesses, said widths being substantially greater than said thicknesses, the left and right cable sections being oriented such that the widths of said left and right cable sections are substantially perpendicular to the width of said unitary cable section.
2. The headphone cable of claim 1, further having a splitter for splitting said unitary cable section into said left and right cable sections.

(*Id.*, co. 4, ll. 10-27.)

As can be seen, neither claim mentions or requires cables with "contoured edges." Thus, contoured edges are not an element of the claims and so are not part of the claimed invention.

The patent's specification includes illustrations that depict an embodiment of the claimed invention consisting of a cable with an oblong cross section and contoured edges. (*Id.* at fig. 3.) But nowhere in the text of the specification do the inventors mention contoured edges, much less describe that feature as functional or useful. The specification

⁵ Contains fabric around the entire cable.

merely refers to the benefits of “flat” cables,” describing them as “inherently more rigid and therefore less prone to tangling.” (*Id.* at col. 4, ll. 10-27.) Each of the design alternatives presented by Professor Rake embodies the invention of Monster’s patent, (namely, each is wider than thick), most are flat or substantially flat, all resist tangling and can easily accommodate wires. Not one, however, incorporates the salient feature of Monster’s mark—the contoured edge.

On May 11, 2011, Monster filed the Application for a contoured edge design for headphone cables. In the first office action on August 17, 2011, the Examining Attorney refused registration of the Application, concluding, that the applied-for mark constituted functional and generic product design under Trademark Act Section 23(c). (Aug. 17, 2011 Office Action, pp. 4-5.) The Examining Attorney based her conclusions largely on visual inspection of Monster’s product on the Internet and selective language from the specification of Monster’s patent. In addition, the Examining Attorney attached several examples of advertising by Monster’s competitors “touting the utilitarian advantages of flat headphone cables” and surmised, without citing to any specific language from any of the advertisements, that Monster’s advertising touts the utilitarian advantages of the design. (*Id.* at p. 3.) None of the advertising, moreover, touts “contoured outer edges.”

Regarding alternative designs, the Examining Attorney said that “applicant’s cable design is one of few alternatives for the design of headphone cables.” But she provided no evidence to support her position. Instead, she speculated that alternative designs might be too thin, too big, or too heavy, or too expensive to manufacture. (*Id.* at p. 4.)

In support of the refusal based on generic product design, the Examining Attorney said that Monster's applied-for mark "appears" to be incapable of acquiring distinctiveness "because many other sources in the marketplace use the same design for headphone cables, as well as for similar type of audio and electronics cables." (*Id.* at p. 5.) The Examining Attorney relied on website screenshots showing headphones sold by Monster's competitors, none of which was legible enough to enable even a skilled designer such as Professor Rake to "discern whether these images depict headphone cables that incorporate [Monster's] design." (Dkt. 15, Rake Decl. ¶ 22.)

Based solely on these deficient examples and speculation, the Examining Attorney found that Monster's applied-for mark "is the basic form of a type of headphone cable and is so common in the industry that it cannot be said to identify a particular source." (Aug. 17, 2011 Office Action, p. 5.)

Monster, in turn, submitted substantial evidence that the Examining Attorney's reading of Monster's patent and her understanding of the marketplace for headphone cables are wrong. (*See* Feb. 13, 2012 Response to Office Action; Dkt. 15, 27, 41.) In addition to the Declarations of Professor Rake and Jacky Hsiung, Monster submitted over 75 examples of headphone cables in the marketplace that use alternative designs. Many tout that their cables with alternative designs are tangle-free in their advertising. (*See* Dkt. 41.)

Despite the significant amount of evidence submitted by Monster that refutes each of the Examining Attorney's arguments, the Examining Attorney declined to reconsider the refusals.

III. DISCUSSION

A. Monster's Mark Is Not Functional

The Examining Attorney must establish a *prima facie* case to support the refusal on the grounds of functionality. TMEP § 1202.02(a)(iv). The burden then shifts to the Applicant to present “competent evidence” to rebut the Examining Attorney’s finding. *Id.* While no set amount of evidence is required, there must be evidentiary support for the refusal in the record. *See, e.g., In re Morton-Norwich Prods., Inc.*, 213 USPQ 9, 16-17 (C.C.P.A. 1982). For the reasons discussed below, the Examining Attorney did not establish a *prima facie* case to support her refusal on the grounds of functionality. Even if the Examining Attorney did establish a *prima facie* case, Monster has rebutted the Examining Attorney’s unsupported findings.

A mark is functional if a feature of that trade dress is “essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165, 34 USPQ2d 1161, 1163-64 (1995) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850, n.10, 214 USPQ 1, 4, n.10 (1982)). The functionality determination is a question of fact, and depends on the totality of the evidence presented in each particular case. *In re Becton, Dickinson & Co.*, 102 USPQ2d 1372, 1375 (Fed. Cir. 2012); *Valu Eng’g, Inc. v. Rexnord Corp.*, 61 USPQ2d 1422, 1424 (Fed. Cir. 2002); *In re Udor U.S.A., Inc.*, 89 USPQ2d 1978, 1979 (TTAB 2009); *In re Caterpillar Inc.*, 43 USPQ2d 1335, 1338 (TTAB 1997).

1. Monster's Utility Patent Does Not Provide Prima Facie Evidence of Functionality

A utility patent that discloses the feature claimed as a mark *may* provide *prima facie* evidence of functionality, but only as to useful and essential features claimed or disclosed in the patent. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 30, 58 USPQ2d 1001, 1005 (2001); *Udor U.S.A., Inc.*, 89 USPQ2d at 1979-80. “It is important to read the patent to

determine whether the patent *actually claims the features presented in the proposed mark* If it does not, or if the features are referenced in the patent, but *only as arbitrary or incidental features*, then the probative value of the patent as evidence of functionality *is substantially diminished or negated entirely*.” TMEP § 1202.02(a)(v)(A) (emphasis added), citing *TrafFix*, 532 U.S. at 34, 58 USPQ2d at 1007. The Supreme Court, mentioned “arbitrary curves” as an example of a features that, though disclosed in a utility patent, might still qualify for trademark protection and registration. *TrafFix*, 532 U.S. at 34, 58 USPQ2d at 1007.

a. Monster’s Patent Does Not Claim the Applied-For Mark

It is a “bedrock principle” of patent law that a patent’s claims—not the abstract, specification, or drawings—define the legal scope of the invention. *Philips v. AWH Corp.*, 75 USPQ2d 1321, 1325 (Fed. Cir. 2005). Because the patentee is required to “define precisely what his invention is,” it is “unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.” *Id.* at 1325-26. Claims and claim terms are to be given their ordinary and customary meaning, as understood by a person of the ordinary skill in the art at the time of the invention. *Id.* at 1326.

Claim 1 of Monster’s patent describes cables with “cross-sectional width and thickness, said width being substantially greater than said thickness” (Feb. 13, 2012 Response to Office Action, ‘633 Patent, cl. 1, col. 4, ll. 10-14.) The claims neither mention “flat” cables nor cables with “curved outer contours.” Although the *drawings* in the specification show flat cables with curved outer contours, such images do not make those specific features elements of the claimed invention. The Federal Circuit has “repeatedly warned against confining” a patent’s claims to a specific embodiment shown in the specification. *Philips* at 1334.

Features need not be claimed in a utility patent to serve as evidence of functionality; statements in the specification “illuminating the purpose served by a design may constitute equally strong evidence of functionality.” *Becton*, 102 USPQ2d at 1377. But nowhere does the specification mention curved outer contours, much less ascribe any function to that feature.

Furthermore, and as Professor Rake’s declaration establishes, the “curved outer contours” of Monster’s applied-for design are akin to the “arbitrary curves” mentioned in *TrafFix*—the curved outer contours of Monster’s mark do not serve a purpose within the terms of Monster’s utility patent; rather, they are arbitrary, incidental to function, and ornamental. (Dkt. 15, Rake Decl. ¶ 21.) The Examining Attorney attempts to deflect Professor Rake’s expert opinion by calling the curved outer contours “a minor element of the overall cable design.” (Feb. 13, 2014, Request for Reconsideration Denied, p. 3.) But she offers no support for that conclusion—one that as a lawyer, not an industrial designer, she is not competent to make. Professor Rake, however, *is* competent to opine of the aesthetic value and impact of Monster’s design,⁶ and he makes clear that the “curved outer contour” of the cable is a significant design feature that is worthy of trademark protection: “[Like the edge treatment of the iPhone], the edge treatment of Monster’s cable design likewise has an impact on how consumers and users perceive and appreciate the product from an aesthetic standpoint. . . . Other design alternatives, such as the ones I propose in Exhibit B, convey different impressions.” (Dkt. 15, Rake Decl. ¶ 21.)

In short, the Examining Attorney admits that “the written portion of the patent does not reference the ‘curved outer contours.’” (Sept. 10, 2012 Office Action, p. 6.) She has not met her burden of providing *prima facie* evidence of functionality because she relied exclusively on

⁶ The Examining Attorney—without basis—took issue with Professor Rake’s qualifications. (Feb. 13, 2014 Request for Reconsideration Denied, p. 4.) But as his CV shows, he has over 30 years’ experience in Industrial Design, has designed a diverse spectrum of products, and has instructed a generation of designers. He clearly possesses “specialized knowledge” within the meaning of Federal Rule of Evidence 702. Moreover, Mr. Hsiung, who is a skilled and experienced cable designer, endorses each of Professor Rake’s opinions.

language and drawings in the Monster Patent that are not part of the narrowly drawn invention as detailed in the patent's claims and explained in the specification. Even if the Board finds that the Examining Attorney provided *prima facie* evidence of functionality based on Monster's patent, Monster has overcome any *prima facie* case through the declarations of Professor Rake and Mr. Hsiung discussed above.

b. None of Monster's Advertising Materials Tout the Design's Utilitarian Advantages

Advertising touting the utilitarian advantages of a mark's design may be taken into consideration in a functionality determination. *See In re Morton-Norwich*, 213 USPQ at 16. The Examining Attorney produced only a handful of screenshots from Monster's website and Facebook page, claiming to show that Monster touts its applied-for mark in its own advertising. Here, however, the advertising merely highlights the "ultra-flexible" and "tangle-free" qualities of the headphone cables. None of the advertising presented by the Examining Attorney references the curved outer contour of the cable. Indeed, the Examining Attorney agrees that the "previously provided advertising did not demonstrate that the curved outer contours of the mark are functional." (Sept. 10, 2012 Office Action, p. 11.)

2. There Are Dozens of Functionally Equivalent Designs On the Market

The availability to competitors of functionally equivalent designs also may be taken into consideration in a functionality determination. *See In re Morton-Norwich*, 213 USPQ at 16; *In re Kun Yuan Lin*, 2012 WL 6654122, at *4 (TTAB 2012) (finding that applicant's submission of seven competing products that do not use ridges like the applicant's design was sufficient to show the existence of functionally equivalent designs). The existence of functionally equivalent designs is probative that a design sought to be registered as a trademark is non-functional. TMEP § 1202.02(a)(v)(B), citing *In re Dietrich*, 91 USPQ2d 1622, 1636 (TTAB 2009); *Valu Eng'g*, 61

USPQ2d at 1427 (“[I]n determining ‘functionality,’ the Board must assess the effect registration of a mark would have on competition.”).

Professor Rake provided ten alternative designs for headphone cables that practice applicant’s utility patent and that can achieve the functional advantages described in that utility patent. (Dkt. 15, Rake Decl. ¶ 19.) The Examining Attorney concluded that Monster’s competitors would not consider these alternatives viable. (Feb. 13, 2014 Request for Reconsideration Denied, pp. 3-4.) But she presented no evidence to support that conclusion or to contradict the well-informed expert opinion of Professor Rake or the evidence provided by Mr. Hsiung.

Furthermore, Monster and its competitors do, in fact, use alternative headphone cable designs. Monster’s Diesel headphones feature a unique triangular shape that is also tangle-free. Monster’s competitor “Zip Buds” incorporates a cable that is wider than it is thick, but does not include Monster’s applied-for mark.



Dkt. 41, Coleman Decl., Ex. 24.

Monster’s competitor QFX incorporates a fabric-covered cable that is wider than it is thick but does not include Monster’s applied-for mark.



Dkt. 41, Coleman Decl., Ex. 3

This evidence stands unrefuted.

The Examining Attorney dismissed Monster's examples of alternative designs, claiming that the examples "do not show how these cables would attach to the ear buds or the splitter referenced in the patent . . . The cable styles proposed by the applicant would not fit as securely into the ear buds and splitter shown in the patent application." (Feb. 13, 2014 Request for Reconsideration Denied, pp. 3-4.) This argument relies on speculation that the splitter shown in Monster's utility patent is the *only* available splitter for the myriad cable designs within the scope of the patent. The patent, however, does not specify nor require any particular splitter configuration. Rather, claim 2 simply recites "[t]he headphone cable of claim 1, further have *a* splitter for splitting said cable section into left and right cable sections." (Feb. 23, 2012 Response to Office Action, '633 Patent, col. 4, ll. 25-27 (emphasis added).) Mr. Hsiung, moreover, explains that it would be a routine matter for a headphone designer of ordinary skill to design splitters that would accommodate each of the alternative embodiments presented in Exhibit B of Professor Rake's Declaration. Doing so would not increase the difficulty or cost of manufacture. (Dk. 27, Hsiung Decl. ¶ 9.)

The Examining Attorney has also attempted to minimize the significance of design alternatives by concluding that they would impair functionality and likely be more expensive to

manufacture. Again, those conclusions were based on conjecture and are rebutted by Monster's evidence. As Professor Rake explains, each of his alternative design concepts can be used to practice the invention disclosed and claimed in Monster's patent. Furthermore, Mr. Hsiung confirms that each of Professor Rake's proposed alternative designs could be produced without additional cost or complexity of manufacture. (Dkt. 15, Rake Decl. ¶¶ 19, 21; Dkt. 27, Hsiung Decl. ¶ 8.)

B. Monster's Mark Is Not Generic

The Examining Attorney has the burden of proving genericness by "clear evidence." 2 McCarthy on Trademarks and Unfair Competition § 12:57 (4th ed.) "In the context of product design, genericness may be found where the design is, at a minimum, so common in the industry that it cannot be said to identify a particular source ." *Stuart Spector Designs Ltd. v. Fender Musical Instruments*, 94 USPQ2d 1549, 1555 (TTAB 2009). The use by competitors of a design can serve as evidence of genericness. *See id.* (finding applicant's guitar body generic since opposer showed numerous third parties offering guitars with similar/identical configurations). Significantly, however, "[d]oubts are resolved in favor of the applicant when the generic status of a term is in doubt." 2 McCarthy on Trademarks and Unfair Competition § 12:57 (4th ed.).

Again, the Examining Attorney did not meet her burden. She relied on print-outs from the Internet as evidence that third-parties are using and selling headphone cables with Monster's design, such that the design is "common in the industry" and "cannot be said to identify a particular source." Those printouts, however, do not establish use of Monster's mark, namely a cable with a "curved outside contours of a headphone cable that give way to sides of the cable jacket that are wider than they are thick." As Professor Rake explains, the images of headphone cables submitted by the Examining Attorney are inconclusive; they do not show the details of the

headphone cables. (Dkt. 15, Rake Decl. ¶ 22.) Accordingly, significant doubt exists regarding whether, as in *Stuart Spector v. Fender*, Monster's contoured cable design is so ubiquitous that it should be deemed generic.

Even if accepted, the Examining Attorney's genericness evidence is insufficient because the Examining Attorney fails to place that evidence into context of the larger headphone market. As shown in the declarations submitted by Monster after collecting examples of headphone cables from the marketplace, consumers have many headphone options to choose from in stores and online. (Dkt. 41, Coleman Decl., Mersing Decl.) The majority of headphones in the marketplace feature round cables. "Flat" headphones are only a subset of the headphone market.

Furthermore, the Examining Attorney presented no evidence regarding sales, advertising, or marketing of any of those headphone products. Even assuming their presence on the Internet reflects offers for sale, there is no evidence regarding the date(s) of first sale, whether sales have been continuous, or the extent of any such sales in terms of units and dollar value. Thus, the record lacks any basis to conclude that any of these headphone products have achieved any level of market penetration or commercial success. So even assuming that the images contained in these Internet print-outs reflect use of Monster's design by other manufacturers, there is no competent or reliable evidence to prove that their commercial use has become so prevalent or persuasive as to render Monster's original, ornamental, non-functional design generic.

There is, however, evidence that Monster's mark is in fact perceived by the industry as being capable of identifying the source of goods. Beats Electronics, a leading brand of headphones with over 25% of the \$1.8 billion headphone market, has taken a trademark license for Monster's mark. (Dkt. 27, Ex. A.)

IV. CONCLUSION

For all these reasons, the refusal to register Monster's mark based on alleged functionality and genericness should be withdrawn.

MONSTER, INC.

Dated: January 20, 2015

By: /Robert D. Litowitz/
Robert D. Litowitz
robert.litowitz@kelly-ip.com
Linda K. McLeod
linda.mcleod@kelly-ip.com
Kelly IP, LLP
1330 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20036
Telephone: 202-808-3570
Attorneys for Applicant